

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

IRISH 4 REPRODUCTIVE HEALTH, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Defendants.

Case No. 3:18-cv-491-PPS-MGG

Judge Philip P. Simon

MOTION TO SET A RULE 16 CONFERENCE

Pursuant to Federal Rule of Civil Procedure 16 and Rule 16-1 of the Local Rules of the Northern District of Indiana, Irish 4 Reproductive Health, Natasha Reifenberg, and Jane Does 1-3 (together, “Plaintiffs”) respectfully request that the Court issue a notice setting a new date for a pre-trial conference (a “Rule 16 Conference”). Plaintiffs have conferred with Defendants, who informed Plaintiffs that they oppose this Motion.

The Rule 16 Conference scheduled for April 2020 was vacated in light of Defendants’ request to stay this case following a grant of certiorari by the Supreme Court in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 918 (2020). Dkt. No. 92. Following the Supreme Court’s decision in that case, issued on July 8, 2020, the parties to this action filed a joint status report (Dkt No. 94) (the “Joint Status Report”). In the Joint Status Report, the Federal Defendants took the position that setting a deadline for answering Plaintiffs’ complaint or discovery “would be premature and inefficient prior to the resolution of any dispute between Defendants and Plaintiffs concerning which, if any, of Plaintiffs’ claims survive the Supreme Court’s decision in *Little Sisters*.” Joint Status Report at 3. Notre Dame agreed and

joined the Federal Defendants’ position in full, writing that the Court should “decide, with the benefit of briefing, which claims and issues remain in the case before requiring Defendants to answer and proceed to discovery, thus conserving both the parties’ and the Court’s resources.” Joint Status Report at 4 (*see also id.* at 4: “Defendants should not be required to answer, or to proceed with discovery, until it becomes clear which claims and issues remain after *Little Sisters.*”).

Following a telephonic hearing on August 6, 2020, this Court set a briefing schedule for motion to dismiss. Dkt No. 97. Plaintiffs’ understanding from the telephonic hearing was that a schedule for discovery would not be set until after the Court issued a decision on the motions to dismiss. *See* Dkt. No. 99 at 19 (expressing the Court’s intention to decide on motions to dismiss quickly and awareness “of the need to get this moving one way or the other, either moving toward discovery or up to the Circuit.”).

The Federal Defendants have now changed course, informing Plaintiffs and the Court in a footnote to their motion to dismiss briefing that they “plan to produce the administrative record and move for summary judgment on [Count III of the Second Amended Complaint] within the next three weeks.” Dkt. No. 109-1 at n.3. Should the Federal Defendants do so, Plaintiffs will be reviewing the administrative record, opposing two motions to dismiss, and responding to a motion for summary judgment simultaneously.

Plaintiffs agree that discovery and the production of the administrative record will assist in the resolution of this case, a position they have maintained since the Supreme Court issued the *Little Sisters* decision. *See* Joint Status Report at 2. Plaintiffs intend to seek discovery, and believe setting deadlines for both discovery and the filing of motions for summary judgment will conserve the resources of parties and the Court and promote efficiency. Pursuant to Rule 16,

matters to be considered at a pretrial conference expressly include “determining the appropriateness and timing of summary adjudication under Rule 56,” Fed. R. Civ. P. 16(c)(1)(E), “controlling and scheduling discovery,” Fed. R. Civ. P. 16(c)(2)(F), and “disposing of pending motions,” Fed. R. Civ. P. 16(c)(2)(K).

For these reasons, Plaintiffs respectfully request that the Court set a Rule 16 Conference.¹

Dated: September 29, 2020

Respectfully submitted,

/s/ Anne S. Aufhauser

Janice Mac Avoy (admitted *pro hac vice*)
Anne S. Aufhauser (admitted *pro hac vice*)
R. David Gallo (admitted *pro hac vice*)
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
One New York Plaza
New York, NY 10004
Telephone: (212) 859-8000
janice.macavoy@friedfrank.com
anne.aufhauser@friedfrank.com
david.gallo@friedfrank.com

Jeffrey A. Macey
Macey Swanson LLP
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204
Telephone: (317) 637-2345
jmacey@MaceyLaw.com

Counsel for all Plaintiffs

¹ Plaintiffs reserve their right to move under Rule 56(d) for the Court to defer or deny the Federal Defendants’ motion for summary judgment. Fed R. Civ. P. 56(d); *see also Smith v. OSF Healthcare Sys.*, 933 F.3d 859, 865 (7th Cir. 2019) (“Parties and district courts ordinarily set schedules not only for trial dates but also for discovery and motion practice that allow time for summary judgment motions and the discovery needed to file or oppose them.”).

Richard B. Katskee (admitted *pro hac vice*)
*Americans United for Separation of
Church and State*
1310 L Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 466-3234
katskee@au.org

Fatima Goss Graves (admitted *pro hac vice*)
Gretchen Borchelt (admitted *pro hac vice*)
Sunu Chandy (admitted *pro hac vice*)
Michelle Banker (admitted *pro hac vice*)
Lauren Gorodetsky (admitted *pro hac vice*)
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
Telephone: (202) 588-5180
fgraves@nwlc.org
gborchelt@nwlc.org
schandy@nwlc.org
mbanker@nwlc.org
lgorodetsky@nwlc.org

*Counsel for Plaintiffs Irish 4 Reproductive Health
and Jane Doe 1*

Emily Nestler (admitted *pro hac vice*)
Jessica Sklarsky (admitted *pro hac vice*)
Caroline Sacerdote (admitted *pro hac vice*)
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600
enestler@reprorights.org
jsklarsky@reprorights.org
csacerdote@reprorights.org

*Counsel for Plaintiffs Natasha Reifenberg, Jane
Doe 2, and Jane Doe 3*